

U.S. Department of Labor

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Issue Date: 25 May 2005

In the Matter of:

Disputes concerning the payment of
prevailing wage rates, overtime pay
and proposed debarment by:

Case No.: 2003-DBA-4

ATLAS CONSTRUCTION, LLC;
MICHAEL PANTELIS, Owner
Prime Contractor/Respondents

With respect to laborers and mechanics
employed by the contractor on project
number DTCG47-00-C-EFK17, U.S.
Coast Guard Station, Hampton Bays,
New York

DECISION AND ORDER

This proceeding was initiated by the issuance of an Order of Reference dated May 20, 2003 by the Administrator, Wage and Hour Division, United States Department of Labor asserting the failure to pay prevailing wage rates and overtime pay. *ALJx3*.¹ The Order of Reference alleges that Atlas Construction, LLC (Atlas) and owner Michael Pantelis, Respondents, disregarded their obligations to their employees under the Davis-Bacon Act, 40 U.S.C. 276(a) *et seq.* (DBA), and committed aggravated or willful violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 *et seq.* (CWHSSA) during rehabilitation of the U.S. Coast Guard Station Shinnecock, Hampton Bays, New York.

Respondents deny the Administrator's allegations. Hearings were held on November 5, 6, and 7, 2004 in New York, New York. Post-hearing briefs were submitted by the Administrator and Respondents on December 16, 2004. Respondents submitted a Reply Brief on December 22, 2004. Administrator submitted a Reply Brief on December 27, 2004. Based on the record made at the hearing, the following is entered:

¹ The following abbreviations are used for reference within this opinion: *ALJx* (Administrative Law Judge Exhibit); *DOLx* (Department of Labor Exhibit); *Rx* (Respondents Exhibit); and *Tr.* (Hearing Transcript).

FINDINGS OF FACT

Respondents were awarded contract number DTCG47-00-C-3EFK17: the rehabilitation of the United States Coast Guard Station Shinnecock at Hampton Bays, New York. *DOLx8*. The rehabilitation entailed completely gutting the building, rebuilding the inside of the existing building, constructing an addition, and constructing two stairwell additions. The terms of the contract required Respondents to comply with the Department of Labor Wage Determination General Decision Number NY000013 which set the total hourly rate for carpenters at \$51.10 and the total hourly rate for laborers at \$41.83. *DOLx7*.

The Coast Guard authorized Respondents to commence work on the project on March 8, 2001 by letter of the same date.² *ALJx1 at 4*. John Stotzky, Coast Guard inspector on the project, testified that the original start date was scheduled for March 11, 2001, but that the start date was delayed, and Stotzky did not begin getting paid for the project until approximately May 17, 2001. *Tr. at 417, 439*. Respondents' weekly payroll for the project begins on June 4, 2001. *DOLx9*. The earliest daily construction report in the record is dated June 11, 2001. *RxO*. Requisition reports, that is, reports prepared for purpose of billing or requisitioning payment from the Coast Guard for work completed on the project show Respondents began mobilization on the project on March 30, 2001. *Tr. at 365; RxP*. The same records show demolition began on May 21, 2001. *RxP*. Stotzky was employed by Jacobs Engineering, who had a contract with the Coast Guard to provide "oversight and surveillance and inspection" of the project. *Tr. at 416*.

The Department of Labor's Wage and Hour Division conducted an investigation which resulted in a determination that Respondents violated the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. *ALJx1*. The violations include failure to pay the prevailing wages incorporated into the contract, failure to pay time and one-half the base rate of pay for hours worked in excess of forty in the workweek, and submission of falsified payroll records. *ALJx1*. Partial Consent Findings and Order was issued on October 12, 2004, resolving the complaint as to eight employees and leaving at issue a total of \$187,983.12 in back wages owed to the following individuals: Blythe Ewing, Lennox Allen, Kingsley Valley Ewing, Andrew Ewing, and Neil Rigby. *DOLx12*.

DISCUSSION

The Administrative Review Board discussed the parties' burdens in a case involving unpaid wages under the Davis Bacon Act in *Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37, ARB Case No. 00-050 (ARB August 27, 2001). The ARB referred to the United States Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) as delineating the parties' respective burdens of proof. The ARB reasoned that under *Mt. Clemens* the Administrator has the initial burden of establishing that the employees performed work for which they were improperly compensated. The ARB quoted *Mt. Clemens* in holding that "[t]he

² Respondents were authorized to commence work at the job site on March 8, 2001 by a letter from Cathy Broussard, the Coast Guard Contracting Officer for the project, notifying them that their Performance and Payment Bonds for the project had been received and approved and that her letter constituted authority to commence work at the job site. *ALJx1 at 4*.

Administrator has carried his burden if he proves that the employees have in fact performed work for which they were improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Thomas & Sons Building Contractors, supra, at 6.*

Blythe Ewing

The Administrator claims that Respondents are liable for the back payment of wages for the failure to pay Blythe Ewing wages due under the DBA in the amount of \$37,677.28 during the period starting with the week ending July 7, 2001, through the week ending May 11, 2002, and under CWHSSA in the amount of \$1,027.68 for the failure to pay overtime sometime during the same period. *Updated DOLx13.*³

The part of the Administrator's claim concerning Blythe Ewing was based on interviews with him as well as his testimony at the hearing. John Bialt, Jr. and Camille Coppola, investigators for the Wage and Hour Division of the Department of Labor, also testified in support of Blythe Ewing's claim, but their testimony as to his employment was based on their interviews with him.

Blythe Ewing testified that he began working on the Shinnecock project as a carpenter on July 9, 2001, and he continued working on the project until January of 2002, at which time he went to work at Respondents' project in Westover, Massachusetts, where he worked until April of 2002. *Tr. at 11, 12.* According to his testimony, he returned to the Shinnecock project in April of 2002, and his last day of work on the project was May 17, 2002. *Tr. at 13.*

Blythe Ewing's testimony differs sharply from Respondents' certified payroll records. Those records show Blythe Ewing working on the Shinnecock project for only four weeks: as a laborer from February 28, 2002 to March 3, 2002 and from March 11, 2002 to March 15, 2002, and as a carpenter from April 29, 2002 to May 3, 2002 and May 6, 2002 to May 10, 2002. *DOLx9.* Respondents argue that Blythe Ewing's testimony should not be accepted as creditable as it is not corroborated by any other evidence, and more importantly is inconsistent with not only the certified payroll records but other records showing the progress of construction. There are three sets of records showing the progress of construction: 1) daily construction reports; *RxO.* 2) weekly construction reports; *RxN.* and 3) monthly contractor requisitions. *RxP.* Daily construction reports were prepared in handwriting by Respondents' personnel on a daily basis and presented to Stotzky, the Coast Guard inspector on the job, for him to initial and send to the Coast Guard office in Norfolk, Virginia. The daily reports would provide information on work completed, work started and equipment used on that day. *Tr. at 423.* The weekly reports were generated by Stotzky on a weekly basis and sent to the Coast Guard Norfolk office on either Thursday or Friday of each week. The reports included photographs taken by Stotzky. The

³ DOL exhibits 12 and 13 were "updated," or more accurately stated, corrected post-hearing because of errors in the exhibits offered at hearing.

purpose of the reports and the photographs were to show the progress of the project. *Tr. at 425, 425.* Monthly contractor requisitions were submitted by Atlas to the Coast Guard for payment for work performed the prior month. The report describes the work completed that month. *Tr. at 366-368. RxP.* The report was prepared by Stella Tsimbikos, Respondents' Director of Business who ran the everyday routine of the office. *Tr. at 359, 360.* Tsimbikos testified that she received the information that she placed in the report, i.e. the percentage completion of a job, from an Atlas employee at the job site. Upon completing the report she would transmit it to inspector Stotzky, who would review it for the accuracy of the amount of work completed, sign the report, and return it to Tsimbikos, who in turn would send it on to the Coast Guard office for payment. *Tr. at 368-36, 384.*

Initially, Blythe Ewing's testimony as to when he started working at Shinnecock is not believable. Blythe Ewing testified that when he first arrived at the site on July 9, 2001, "the first and second floor was clean, was ready to start laying out separating the rooms. We started ... laying out the floors." *Tr. at 13.* However, demolition of the main building was still in progress in July of 2001 and no framing took place in July 2001. The daily and weekly construction reports document framing as described by Blythe Ewing as actually beginning in December of 2001, not in July of 2001. *Rx N and RxO.* The weekly reports do not show any framing for rooms until a December 15, 2001 report. In fact, there is no mention of inside carpentry work until an October 27, 2001 report which states that Atlas will be submitting a proposal to change the wood ceiling trusses to metal to keep ceiling above eight feet tall. *Tr. at 259-268 Rx N.* The monthly requisition reports show that no money was billed to the Coast Guard for framing and sheet rock installation work until invoice number 6 which billed for work during the month ending December 23, 2001. *Tr. at 371; Rx. P.* Stotzky testified that he verified the accuracy of the reports. He testified that he would not recognize work done but not reflected in the requisition reports. "I really couldn't let that happen especially on a requisition." *Tr. at 443, 444.*

To find Blythe Ewing's testimony that he worked at Respondent's Shinnecock project during the period July 1, 2001 to December 2001 to be creditable, one would have to find that all of the project reports erroneously depicted the progress of the project, and one would have to disbelieve the testimony of Coast Guard inspector Stotzky.

Moreover, on July 9, 2001, the day Blythe Ewing claims to have started work on the project, asbestos was found in the building under the carpeting that was being removed. *RxO (July 9, 2001 daily construction report).* The process of removing the asbestos required the effected area to be cleared of material and equipment and to be completely blocked off. *RxO (October 1, 2001 through October 9, 2001 daily construction reports).* The weekly progress reports provide photographic evidence of the effected areas being sealed off in order to remove the asbestos. *RxN (weekly progress report of October 13, 2001 through October 20, 2001).* The actual removal of the asbestos was not completed until November 17, 2001. *RxO (November 17, 2001 daily construction report).* Therefore, Blythe Ewing could not have been doing the framing work from July through December of 2001 as he described.

There are other problems with the creditability of Blythe Ewing's claim. Information given by Blythe Ewing to DOL investigator John Bialt Jr. resulted in a report prepared by Bialt

dated July 12, 2002 finding that Blythe Ewing was due the payment of \$51,854.35 from Respondents in back wages because he had worked off the payroll for Atlas during the period commencing the week ending July 7, 2001 until the week ending May 18, 2002. *ALJx1 at 2*. This report formed the basis of a notification by DOL to Respondents that they owed that amount of back wages to Blythe Ewing. *ALJx1; ALJx1at 2*. Respondents' attorney subsequently met with the DOL inspector and showed to him payroll records establishing that Blythe Ewing could not have worked at the Shinnecock project during the period from January 21, 2002 through the end of March, 2002 as he was compensated for work he performed at Respondents' project at Westover, Massachusetts during the same period. *Tr. at 237-240, 335, 336; ALJx1 at 7*. As a result of this information from Respondents' attorney, DOL adjusted the back pay due Blythe Ewing downward to \$38,019.84.⁴ The new amount was referenced in a DOL report dated October 1, 2004, five days prior to the hearing in this matter. *DOLx13*.

Respondents certified payroll records show Blythe Ewing working at Shinnecock as a laborer from February 28, 2002 to March 3, 2002 and from March 11, 2002 to March 15, 2002, and as a carpenter from April 29, 2002 to May 3, 2002 and May 6, 2002 to May 10, 2002. *DOLx9*. Thus, the only times when Blythe Ewing could not have received the prevailing wage because of working off the payroll at the Shinnecock project are the month of December, 2001, three weeks in January, 2001, and three weeks in April, 2002. A significantly shorter period than the nine months Blythe Ewing asserted in his initial report to DOL.

Blythe Ewing also testified that he worked at Shinnecock on Thanksgiving Day, November 22, 2001, and on New Years Day, 2002. *Tr. at 42, 43*. However, the certified payroll records and the daily construction reports show that no employees worked on those days as they were paid holidays. The daily construction reports were signed as accurate by Stotzky, the Coast Guard inspector.

The Administrator refers to a daily log purportedly kept by Blythe Ewing as corroborative evidence of the hours Blythe Ewing worked for Respondents. *DOLx1*. Blythe Ewing testified that he would enter the hours that he worked in a log book every day:

Q. Now when would you enter these hours into the book?

A. These are entered in my book at night.

Q. Would you do it every day?

A. Every day yes.

Tr. at 22.

⁴ Blythe Ewing subsequently provided a written statement to the DOL investigator which included his work at the Westover, Massachusetts project. *RxL*. Consequently, the Department amended its statement of the back wages due Blythe Ewing by Respondents by excluding the period he worked at Westover.

However, the contemporaneous nature of the log book is called into question by some of the entries. In his entries for the first week of April, 2002, Blythe Ewing wrote the location of his work as Hampton Bay and his time for each day of the week as 7:30 to 4:30. He later changed the entries by scratching out Hampton Bay and writing over the 7 in 7:30 to change it to 8:30. He also changed the entries of the starting time for the first two days of the week from 7:30 to 8:00 by writing a zero over the three in 7:30. The changes were made to alter the book's showing of the location of Blythe Ewing's work that week from Shinnecock to Westover. According to Blythe Ewing's testimony, 8:00 reflects the starting time for the job in Westover, whereas 7:30 would reflect the typical starting time at Shinnecock. Also, Blythe Ewing testified on cross-examination that the book shows him working at Westover on New Years Day, even though he testified on direct examination that he was certain he worked at Shinnecock on New Years Day. The contemporaneous existence of the log book is also questioned because Blythe Ewing never mentioned it to the investigator. *Tr. at 52, 257.*⁵

The Administrator's claim that Respondents violated the CWHSSA by not paying Blythe Ewing time and one half of their wage determination for hours worked in excess of 40 hours a week is supported solely by the testimony of Blythe Ewing that he "worked about four or five times" over 40 hours in a week and "about three" weekends in July, 2001. However, the daily construction reports do not show any work being done on weekends in July and Blythe Ewing's own log book does not show him working weekends in July. As to the other four or five post 40 hour work weeks, there is no evidence as to when they occurred. The computation reports prepared by DOL showing due back wages do not attempt to provide a time frame for the occurrence of the overtime. Camille Coppola, DOL investigator who calculated the amount underpaid, was asked on cross-examination when the overtime claimed by the employees occurred. She responded:

A. I cannot tell you specifically when it occurred.

Q. And isn't it a fact that the employees never gave you any specific information with regard to when they claimed they worked on a overtime basis?

A. Correct.

Q. And you did nothing further towards the investigation to determine if overtime had occurred and that these particular employees had worked overtime. Isn't that correct?

A. That's correct.

JUDGE BURKE: So the report of the employees was that sometimes during the period of time that they worked at Atlas they estimated overtime of about four weeks. Is that correct?

THE WITNESS: That's correct.

⁵ Inspector Bialt testified that he did not know about Blythe Ewing's time log book. "I'm not familiar with that book at all." *Tr. at 257.*

Thus, the Administrator's finding that Respondents failed to pay overtime is particularly thin. The account of Blythe Ewing, which is its sole basis, does not tell when the overtime occurred. It is not corroborated by any other evidence, and is in fact contradicted by contemporaneous daily construction progress reports. Further, the Administrator has accepted that other employees who would have traveled everyday in a van with Blythe Ewing to and from the job site worked only 35 hours. *Tr. at 24, 434; ALJx1, attachment 3, Tr. at 251-254.* Since Blythe Ewing testified to riding to the job site and returning from the job site every day with those employees, it is hard to reconcile the Administrator's acceptance of the 35 hour week for those employees with its claim against Atlas for failure to properly compensate Blythe Ewing for working four 45 hour work weeks during that same period.

Thus Blythe Ewing's testimony is so contradicted by the balance of the record, including construction reports showing the progress of the project, and his own earlier statements to investigators, that it is found to be inherently unreliable, and not supportive of a finding that Respondents violated the DBA and the CWHSSA in its employ of him.

Valley Ewing

Valley Ewing is Blythe Ewing's brother. From early 2000 until sometime in 2003 he lived in a warehouse building owned by Atlas located next to Atlas' office in Brooklyn. According to Tsimbikos, Michael Pantelis allowed him to live there because he was homeless. *Tr. at 361.* While living there he had no phone and he received no mail. *Tr. at 123, 146, 147.* He paid no rent. The arrangement was that he could live there in exchange for keeping the building clean. *Tr. at 124.* Valley Ewing testified that he started working at the Shinnecock project in March 2001 "with a guy named Hector."

Valley Ewing testified to doing jackhammer work, breaking up the front porch, and cleaning up. *Tr. at 135.* His testimony was that he continued doing demolition work April through June of 2001, but started framing in July, 2001. He recalled doing some framing in July with his brother Blythe, Neil Rigby, and Lennox Allen. *Tr. at 151-153.* He portrayed his work at Shinnecock as that of a laborer for about six months and subsequently as that of a carpenter, including installing sheet rock and setting metal studs. *Tr. at 121-122.* He testified that he continued to work on the project until August of 2002. *Tr. at 134.*

Respondents' certified payroll for the project lists Valley Ewing as a laborer for only four days: October 2, 2001 through October 5, 2001. *DOLx9.*

The Administrator's claim against Respondents initially included the assertion that Respondents failed to pay Valley Ewing the prevailing wage for work at the Shinnecock project commencing the week ending January 6, 2001, because that is the date Valley Ewing gave the DOL investigators as his starting date. *RxA.* The claim also demanded back payment for failure to pay Valley Ewing until June 1, 2002, again because that is the date given by Valley Ewing to the investigator as the date when he stopped working on the project. This claim resulted in DOL notifying Respondents that they owed over \$89,500 in back wages to Valley Ewing. *ALJx1; ALJx1at 2.* Subsequently, the DOL investigators learned in a meeting with Respondents'

attorney in early 2003 that the work at the Shinnecock project could not have started in January, 2001. *Tr. at 329*. Consequently, DOL adjusted the back pay due Valley Ewing downward to \$65,719. *DOLx13*.

In fact, work did not commence until May or June 2001. Respondents were not authorized to commence work at the job site until March 8, 2001 when Atlas received a letter from Cathy Broussard, the Coast Guard Contracting Officer for the project, notifying them that their Performance and Payment Bonds for the project had been received and approved, and her letter constituted authority to commence work at the job site. *ALJx1 at 4*. According to the daily construction reports (*Rx O*) and monthly contract requisitions (*Rx P*), no work started on the project until June, 2001. *Tr. at 225*. Stotsky testified that he was hired in February to start at the project in March, but that he did not receive a pay until about May 17, 2001. *Tr. at 417, 441*. Stotsky's understanding for the reason of the delay was: "Just typical beginning construction. I figured it was between the Government and contract and how that works out. It's not – you know, I was pretty upset about it but it is pretty standard." *Tr. at 441*. In an attempt to resolve the contradiction between Valley Ewing's statement and Respondents' assertions about when the project started, investigator Coppola asked Carol Anton, a Coast Guard employee, if there could have been an earlier start than May or June of 2001. Anton responded that the earliest the project could have started was in March after the performance bond was tendered. *Tr. at 328*.

Since Valley Ewing could not have started work in January, 2001 at Shinnecock on a project that had not commenced until at least March and probably May or June of 2001, his statement asserting same, mars the credibility of his testimony. Valley Ewing did testify that his earlier statement was a mistake. *Tr. at 167*. But his earlier statement did not result from a mistake, at least not an inadvertent mistake. Valley Ewing told DOL investigators that he had started work at Shinnecock in January 2001 on three occasions. During a July 1, 2002 interview with a DOL investigator he stated that he had worked for Respondents at Shinnecock from January, 2001 to April, 2002. A statement signed by Valley Ewing of a telephone interview conducted by a Department investigator five months later, on November 5, 2002, reads in part: "Investigator Bialt told me that the first certified payroll was June of 2001 and that the USCG gave their OK to start work on the project in March of 01. Nevertheless, I began work in January of 01 doing principally demolition work." During an in person interview with a DOL investigator on June, 6, 2003, Valley Ewing again insisted that he started at Shinnecock in January of 2001. He signed a statement, hand written by the investigator, and difficult to read, which states in part: "I'm certain that I started work at Shinnecock Bay in January with Hector and one other person. I did demolition work. I broke down the porch outside (front and back) with jackhammers." Nevertheless this certainty that Valley Ewing expressed in his interviews with the investigators disappeared when he testified under oath on October 5, 2004:

Q Did you ever tell the investigator that you started working in January 2001, sir?

A I don't recall. I think I told him that but that was probably a mistake because I know when I start working up there in March. I start in March.

Q But if you started in March, why did you tell them that you --

A Anybody can make a mistake. I make mistakes. Anybody make mistakes.

I'm not saying that I'm not to be apologizing. Anybody can make mistakes.

Q And did you tell the investigator that you worked through June of 2002?

A Yes.

Q Did you ever change that story and tell him that you only worked through April 2002?

A I don't think I changed my story on that. I don't think so. I can't recall. I don't recall that, that I changed my story.

Tr. at 167, 168.

The vagueness of Valley Ewing's testimony about what he told the investigator regarding when he commenced work at Shinnecock differs from the recollection of investigator Coppola. Investigator Coppola testified that Valley Ewing was positive that he started in January, 2001. She testified:

Both Mr. Bialt and I interviewed Mr. Ewing several times. We could not shake him. We tried. We could not shake him from saying that he began working in January. We determined that it was not possible that work began in January. We had -- we could not prove it. So the earliest we could have made a determination was March of 2001, and we reduced that even further to June of 2001.

Tr. at 342.

Valley Ewing's recollection of when he stopped working at Shinnecock also changed. Although Valley Ewing testified that he did not recall changing his "story" about when he ceased work at Shinnecock, his interview statements to the investigators differ from his testimony. He testified that he worked through June, 2002. However, he told the investigators in interviews on July 1, 2002 and November 5, 2002 that his work ceased in April, 2002. *RxI.*

Even the statements that Valley Ewing gave to investigators about overtime he worked do not square with his subsequent testimony. The Administrator's claim that Respondents violated the CWHSSA by not paying Valley Ewing time and one half of their wage determination for hours worked in excess of 40 hours a week for five weeks of 16 hours per week is supported solely by an interview statement of Valley Ewing that he "might have worked

5 weekends during this period of time.” *RxI*. In contrast, Valley Ewing’s testimony is that he calculated the period of time during which he worked over 40 hours in a week to be “about three months.” *Tr. at 125*.

Respondents question whether written signed statements purportedly given by Valley Ewing to investigators can be attributed to him with any certainty. They contend that some or all of the statements were not signed by Valley Ewing as the signatures do not appear to have been written by the same person and Valley Ewing’s first name is spelled differently. All but one interview with Valley Ewing was conducted by telephone. After the interview, the investigator would mail a write-up of the statement to Valley Ewing for his signature. A review of the signatures shows Respondents’ concern to be justified. The signatures are different and his first name is spelled differently. The July 1, 2002 statement has his first name spelled VELLY. The November 5, 2002 statement signature spells it VALLY. An undated statement located at page 2 of *RxI* is signed with the first name spelled VALLEY, and a signature on the statement taken from the in person interview is spelled VELLY. Valley Ewing was asked about the different spelling of his first name during cross-examination. His answer was:

Well, I think I have the right to spell my name two different ways,
Velley or Valley. That's how I spell it. Sometime I spell it with A and
sometime with an E.

Tr. at 164.

Valley Ewing’s explanation for the different spellings of his first name is that he reserves the right to spell his name two different ways; however, his name is, in fact, spelled four different ways, as it is also spelled VELLY and VALLY.

Valley Ewing’s testimony is inherently unreliable as it is significantly contradicted by his own earlier statements to investigators, the construction reports, and even the Administrator’s claim against Respondents in that it asks for back payments based on his working at Shinnecock until April 3, 2002 even though he testified to working there until June, 2002. Thus the testimony of Valley Ewing does not suffice to show as a matter of just and reasonable inference that Respondents violated the DBA and the CWHSSA in its employ of him.

Respondents raise the issue of why the Administrator included the claims of Blythe Ewing and Valley Ewing in this DBA case against Respondents when their statements to the investigators were so contradictory to the construction reports. The answer lies in Bialt’s testimony that they did not review the Coast Guard’s weekly construction reports or the Respondents’ monthly requisition reports. *Tr. at 221, 234, 235*. Coppola testified that the DOL did not procure the weekly construction reports or the requisition reports until two weeks before the hearing. *Tr. at 309*. They were provided copies of the daily reports, but they didn’t believe the reports, even though they knew the reports were reviewed for accuracy and signed by the Coast Guard inspector. *Tr. at 219, 283*. Their reasoning for not believing the daily reports is circular. The investigators did not question the veracity of the employee statements in light of their inconsistency with the daily construction reports because they did not believe the daily reports, and they did not believe the daily reports because they were inconsistent with the employee interviews. *Tr. at 284, 328-330*.

Lennox Allen

Lennox Allen testified that he worked on the Shinnecock project as a carpenter from late November of 2001 until May of 2002, and that he returned to work there in June of 2002 and finally stopped working on the project in August of 2002. *Tr. at 72, 80 and 85.*

Respondents' payroll for the project lists Allen as a carpenter for work weeks ending May 3, 2002; May 10, 2002; May 24, 2002; July 12, 2002, July 19, 2002; and August 9, 2002. *DOLx9.*

According to Allen's testimony he did carpentry work, installed sheet rock, framed, installed doors and door frames, as well as doing some work on the ceiling. *Tr. at 73, 81.* He testified to being paid \$150 per day plus an additional \$70 at the end of the week. *Tr. at 74.* He was paid in cash initially. When he returned to work in June of 2002, he was paid by check.⁶ *Tr. at 74.* Allen rode in a company van to work from Brooklyn with other employees. *Tr. at 78.* He normally worked approximately forty hours a week, but did work overtime on three Saturdays and two Sundays. *Tr. at 78-80.* He did not receive a pay stub, paid holidays, sick leave, vacation days, or fringe benefits. *Tr. at 80.*

The testimony of Lennox Allen is credible. Allen testified that he began working on the project the last week of November of 2001. *Tr. at 72.* He also testified that he did framing work when he began working on the project. *Tr. at 87.* The daily construction reports show framing beginning within a week of when Allen testified to performing the framing work. *RxO (December 3, 2001 daily construction report).*⁷ He continued working until he was laid off in May of 2002 as the result of Respondents learning about a labor complaint filed against them. *Tr. at 85.* The weekly progress report prepared by Stotzky notes that someone from the state labor department came out to the job site during the week of May 11 through May 17 of 2002 because of a complaint that some employees were not being paid the prevailing wage. *RxN.* The Case Diary for the investigation conducted by the Wage and Hour Division notes that an investigator visited the job site on May 7, 2002. *RxM.* In June of 2002, Allen returned to work on the project. *Tr. at 85.* He continued to work until August of 2002. *Tr. at 85.* As Allen's testimony as to his employment with Respondents coincides with the daily construction reports, the weekly progress reports, or the monthly requisition reports, it enables the Administrator to meet his initial burden of showing that Allen worked for Respondents and was carried off the payroll. The burden then shifts to Respondents to negate the reasonableness of the inference drawn from the employee's evidence. *Anderson v. Mt. Clemens Pottery Co., supra.* Respondents have not sustained that burden as they offered no evidence conflicting with the testimony of Allen, including his testimony regarding working overtime. Respondents easily could have offered the testimony of Michael Pentelis who, according to the certified payroll, was on site for most of the project, or Jeff Gilman, the project foreman, to dispute Allen's testimony that he worked on the project even when not listed by the certified payroll.

⁶ Admitted into evidence at Respondents' request were six checks totaling \$4,144.07 payable to Allen dated in May of 2002. *Tr. 91-93; RxD.* It is assumed that these were payment for Allen's employment on the Shinnecock project during the period he was on the certified payroll and receiving the prevailing wage.

⁷ There is no weekly progress report for the first week of December of 2001 in the record.

Accordingly, it is determined that the Administrator has shown that Allen worked for Respondents on the Shinnecock project off the payroll and without receiving the prevailing wage from late November of 2001 until May of 2002 and from June of 2002 until August of 2002, except the weeks ending May 3, 2002; May 10, 2002; May 24, 2002; July 12, 2002, July 19, 2002; and August 9, 2002 when he was listed on Respondents' certified payroll and received the prevailing wage.

Negative Inference

The Administrator argues that a negative inference should be drawn from Respondent's failure to call Michael Pantelis or "anyone else who worked on the Coast Guard worksite for Atlas to testify at the trial." The Administrator argues that "it is well-settled that when a party fails to call a witness readily available to him who has knowledge of material facts, the court may draw a negative inference that the testimony of the witness concerning those facts would have been unfavorable to the party." Brief at 32-33.

The negative inference, or often called missing witness rule, was expressed early in *Commonwealth v. Webster*, 59 Mass. 295 (1850). Chief Justice Shaw stated:

Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,-- though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstance can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

Commonwealth v. Webster, 59 Mass. 295, 316 (1850). This statement lead to the oft-quoted language in *Graves v. United States*: "The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). While the *Graves* language speaks in terms of a presumption, "the rule has developed, in this respect departing from *Graves*, is now generally expressed as authorizing a permissible inference. Moreover, *Graves* had reference to a situation where the presumption was adverse to the defense. The present rule operates as well in favor of the defense." *Burgess v. United States*, 440 F.2d 226, 233 n.10 (D.C. Cir. 1970).

The Administrator is arguing that because Respondents offered no testimony saying the employees in question did not work at Shinnecock or that the employees in question only worked at Shinnecock during the time periods reflected on the payroll then an inference should be drawn

that the employees in question actually did work at Shinnecock for a longer period of time than is reflected on the payroll. Any negative inference drawn from the *Webster* and *Graves* jurisprudence does not support the Administrator's argument. A negative inference cannot substitute for the burden of proof the Administrator bears.

In the case of Blythe Ewing and Valley Ewing, the Administrator has not met its burden of proving that they in fact performed work for which they were improperly compensated and has not produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Their testimony conflicts with the contemporaneous construction records and with their prior statements. Thus, as the Administrator has failed to sustain its burden in regard to Blythe Ewing and Valley Ewing, a negative inference will not be drawn.

In the case of Lennox Allen, as his testimony is credible and does not conflict with the contemporaneous records documenting the progress of the construction, the negative inference can be drawn, but it is of little consequence. The Administrator has sustained its *Mt. Clemens* burden of proving that he in fact performed work for which he was improperly compensated and has produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *Anderson v. Mt. Clemens Pottery Co., supra*. The Respondent has not sustained its burden of coming forward with the precise amount of work performed or with evidence to negate the reasonableness of the inference drawn from the employee's evidence. Thus, an award of backwages to Mr. Allen is proper with or without the negative inference.

Andrew Ewing and Neil Rigby

The Administrator offered the statements of Neil Rigby and Andrew Ewing, a brother of Blythe Ewing and Valley Ewing (*DOLx10 and 11*) to prove that they were employed by Respondents but were not paid the prevailing wage. *Tr. at 195*. The offer to admit those statements into evidence was denied for reason that they are hearsay and completely lacking in credibility. Neither person appeared to testify at the hearing although Andrew Ewing was under subpoena to appear. The excluded statements were not given under oath. The DOL investigator never met with either person, thus he could not testify that the signature on either statement was by the person who purported to make the statement. The investigator's sole contact with Andrew Ewing and Rigby was by telephone. *Tr. at 187-197*. The record contains no other evidence establishing the length of alleged employment and amount of pay received by Andrew Ewing and Rigby. Therefore, there is insufficient evidence to conclude that back wages are owed to Andrew Ewing and Rigby.

Section 18.802 of the Rules of Practice and Procedure of administrative hearings before the Office of Administrative Law Judges preclude the admission of hearsay evidence unless the hearsay is otherwise admissible under the rules. § 18.803 provides for exceptions to the hearsay rule. Those exceptions generally mirror the exceptions listed in the Federal Rules of Evidence. See Federal Rules of Evidence, Rule 803. The Administrator argues for their inclusion based on the records of regularly conducted activity exception to the hearsay rule. Federal Rules of Evidence, Rule 803(6). Respondents argue that the statements were not business records, and even if they were, the statements lack any indicia of trustworthiness as DOL investigator Bialt

never met Neil Rigby or Andrew Ewing. The statements are a product of Bialt's telephone interviews with persons who identified themselves as Rigby and Andrew Ewing. Bialt took handwritten notes during the telephone conversations, and then produced a type written statement, which he mailed to Rigby and Andrew Ewing. *Tr.* 187.

29 C.F.R. § 18.803(a)(6) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term business as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Although it may be Bialt's regular practice to acquire statements in this fashion, the statements themselves are not records of regularly conducted activity. Rigby and Andrew Ewing did not act in the course of regularly conducted activity when giving the statements. Those statements were not made in the course of regularly conducted activity. In order to fall under the so called business records exception to hearsay, the records must be made in the course of regular conducted activity. The mere transcription of the oral statements into type written statements by Bialt does not transform the statements into records of regularly conducted activity by the Wage and Hour Division.

Assuming *arguendo* that the transcription by Bialt of the oral statements of Rigby and Andrew Ewing makes the statements records of regular conducted activity, there remains an issue of trustworthiness. The records still must possess a level of trustworthiness. Records of regularly conducted activity are inadmissible if "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." In *Anderson et al. v. Westinghouse Savannah River Company*, ___F.3d___ (2005 WL 1027356) (4th Cir. 2005), the Court sustained the exclusion of a report as it did not fall within the exceptions to the hearsay rule because it suffered from multiple levels of hearsay and its limited probative value was far outweighed by the numerous trustworthy concerns. See also *Clark v. United States of America*, ___F.Supp.2d___ (2005 WL 883302 (S.D.N.Y.)) where Court refused to admit an informant's statement under the public record exception of the hearsay rule because it was untrustworthy in that authors of the statement never met or interviewed informant. Here, Bialt cannot verify that Rigby and Ewing in fact made and signed the statements. *Tr.* at 190. The effect of receiving the hearsay statements of Rigby and Ewing into the record without requiring that they have some probable trustworthiness would be to shift the burden of proof to Respondents to show that they did not violate the Davis Bacon Act.

Further, assuming that the statements were records of regularly conducted activity and were not plagued with trustworthiness problems, there remains a question of double hearsay. *See* 29 C.F.R. § 18.805; *Rowland v. American General Finance, Inc.*, 340 F.3d 187, 195 (4th Cir. 2003); *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930). The Administrator is offering the statements for the truth of the matter asserted: that Rigby and Ewing worked for Respondent over a period of time and were not paid the prevailing wage. However, the Administrator has not suggested a hearsay exception that might apply to the statements of Rigby and Andrew Ewing. In fact, the Administrator admits “we don’t agree what is contained in them is true.” *Tr. at 194*. *See Howell Construction Inc. et al.*, WAB Case No. 93-12 (May 31, 1994) where the Wage Appeals Board, in deciding a case under the Davis Bacon Act, characterized itself as “troubled” by the Administrative Law Judge’s making of a factual finding based on testimony described by the Board as hearsay upon hearsay. *Id. at 9*.

The Administrator cites *Bondie v. Bic Corp.*, 947 F.2d 1531 (6th Cir. 1991) in support of its argument. In *Bondie*, the report of a social worker’s interview was held admissible under the business records exception to hearsay. That case is distinguishable from the situation at hand. Most notably, the social worker actually made a report rather than merely transcribing the dialogue of the interview as Bialt did with the statements of Rigby and Andrew Ewing. Additionally, the social worker in *Bondie* conducted a face to face interview; thus the lack of trustworthiness problem was not a factor in that case. The Court in *Bondie* did not address the issue of double hearsay.

Thus, as the statements of Rigby and Andrew Ewing are not records of regularly conducted activity because they were not made in the course of regularly conducted activity and lack trustworthiness, the statements were properly excluded at the hearing.

Respondent also refers to case law that it contends requires that Rigby and Andrew Ewing be awarded back wages as non-testifying employees. Respondent cites to *R.C. Foss & Son Inc.*, WAB Case No. 87-46 (Dec. 31, 1990) and *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050 (Aug. 27, 2001). While “it is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees,” (*R.C. Foss & Son*) the Administrator still must satisfy its burden of proving that the employees in fact performed work for which they were improperly compensated and produce sufficient evidence to show the amount and extent of that work as a matter of just a reasonable inference. *Anderson v. Mt. Clemens Pottery Co.*, *supra*. All the Administrator offers is the testimony of Blythe Ewing, Lennox Allen, and Valley Ewing. None of these men are able to give credible testimony to the degree of sufficient evidence to show the amount and extent of work [completed by Rigby or Andrew Ewing] as a matter of just a reasonable inference. The Administrator’s depiction in his brief of John Stotsky’s testimony as showing that that “there were three brothers working at the site, clearly referring to Blythe, Andrew, and Valley Ewing,” is a mischaracterization of Stotsky’s testimony. Stotsky was unable to give the names of any of the employees in question when asked. *Tr. at 467*. When asked if he knew Blythe Ewing, Stotsky replied, “I know there was some brothers, and I think he was one of the three or seven brothers total but I think when I went over with John, on some of the names that I kind of got a few of them confused thinking that Blythe and somebody else might have been.” *Tr. at 467-468*. This

testimony is a far cry from a clear reference to Blythe, Valley, and Andrew Ewing. Thus, the Administrator has not produced sufficient evidence to show the amount and extent of the work performed by Rigby and Andrew Ewing; hence, they are not awarded back wages under a theory of representative testimony espoused by *R.C. Foss & Son Inc.*, WAB Case No. 87-46 (Dec. 31, 1990) and *Thomas & Sons Building Contractors, Inc.*, ARB Case No. 00-050 (Aug. 27, 2001).

Calculation of Back Wages Owed

The Administrator asserts back wages in the amount of \$38,853.68 are due to Lennox Allen. *DOLx12*. These figures are based purely on Allen's testimony. Therefore, a recalculation of back wages owed is necessary.

The \$38,853.68 owed to Lennox Allen as calculated by the Administrator credit Mr. Allen with starting work the week ending November 25, 2001. *DOLx12*. Allen testified that he began working on the project doing framing work the last week of November of 2001. *Tr. at 72, 87*. The construction reports show framing beginning about the same time. *RxO (December 3, 2001 daily construction report)*. Thus, the record supports a determination that Allen began working for Respondents on the Shinnecock project the last week of November (week ending December 2) and the total amount of back wages owed to Lennox Allen is \$35,387.07. This figure reflects 28 weeks of work for which Mr. Allen should have been paid \$2044 a week, not the \$750 he received; 40 hours reflecting five days of overtime for which Mr. Allen should have been paid \$46.41 per hour, not the \$18.75 he received; minus the additional \$70 per week Mr. Allen received as compensation.

Debarment of Atlas Construction, LLC and Atlas Officials

The Administrator is seeking debarment in this case for violations of the Davis-Bacon Act. The Administrator seeks debarment of Atlas Construction, LLC and Michael Pantelis, President of Atlas Construction, LLC, for falsification of certified payroll records and the underpayment of employees. Twenty nine C.F.R. § 5.12(a)(2) allows for debarment of contractors and their responsible officers "who have been found to have disregarded their obligations to employees." Furthermore, "to be of any real effect in insuring future compliance with the requirements of the [Davis-Bacon] Act, a debarment would have to be directed against [company officials]" and the company. *Facchiano Construction Co. v. Department of Labor*, WAB Case No. 91-06 (August 29, 1991). The evidence of record has established that Respondents have disregarded their obligations under the Act and have in fact falsified certified payroll records of Lennox Allen and underpaid Lennox Allen. Therefore, §3(a) of the Davis-Bacon Act and 29 C.F.R. §5.12(a)(2) of the implementing regulations mandate debarment.

ORDER

In consideration of the aforesaid, it is hereby **ORDERED THAT:**

1. Atlas Construction, LLC and Michael Pantelis be DEBARRED under section 3(a) of the Davis-Bacon Act for a period not to exceed three years; and

2. \$35,387.07 in back wages shall be distributed to Lennox Allen from the sums being held against Atlas Construction LLC by the U.S. Coast Guard .

A
Thomas M. Burke
Associate Chief Administrative Law Judge

NOTICE OF APPEAL: Any party dissatisfied with this decision may appeal it within forty (40) days from the date of this decision by filing a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, under 29 C.F.R. § 6.34 and 29 C.F.R. Part 7. Such filing will have the effect of making this decision inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision. 29 C.F.R. § 6.33(b)(1).